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NO. 253783

IN THE COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

JEFF KEELY, in his individual capacity, and
DAVID DORSEY and NANCY DORSEY,
a marital community, Respondent

v.

COUNTY OF CHELAN, a municipal Corporation
Acting through its hearing examiner;
and ROBERT CULP, P.E.,
MUNSON ENGINEERS, INC; and
ANTON ROECKL, Dba WICO, Appellant

APPELLANTS BRIEF
REVISED JULY 25, 2007

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B. STATEMENT OF THE CASE

On March 11, 1989 Robert Culp, P.E. of Munson Engineers, Inc. applied on behalf of Anton Roeckl dba WICO, hereinafter for convenience purposes referred to as "WICO", for a conditional use permit to develop the property involved in the present appeal as legally described in the relevant administrative record and attachments (Administrative Record, hereinafter referred to as "AR" document 30, Findings of Fact Conclusion of Law and Decision of Hearing Examiner dated the 19th day of August, 2005, Page 1 Finding of Fact #5, AR document 33, Supplementary Staff Report CUP 1955/SDP 99-5/SCUP 99-5 Missouri Harbor by Deana Walter, Assistant Director, Page 1 and AR 137, Application Materials). Please note that the Administrative Record and index are designated documents 17 and 19 in the Clerk's papers, however, for clarity purposes, future cites will only be to the Administrative Record and not the Clerk's Papers.

After various revisions and updates were filed for a subdivision and condominiums (AR 30, Findings of Fact Conclusions of Law and

Decision dated the 19th day of August, 2005, Finding of Fact 37, pages 5 through 7; AR 33, Supplementary Staff Report by Deana Walter, pages 3 through 5; AR 137, Application Materials), in approximately 1991 the subdivision portion of the development and the condominium project with waterfront amenities were divided into two separate applications under P 96-112 for the ninety (90) unit plat and CUP 1955 for the eighty (80) unit condominium project. (AR 30, Findings of Fact Conclusions of Law and Decision dated the 19th day of August, 2005, Finding of Fact 37, pages 5 through 7; AR 33, Supplementary Staff Report by Deana Walter, pages 3 through 5; AR 137, Application Materials).

In January of 1992 the revised application disclosed an application for a fifty (50) unit townhouse development, marina, pool, sea wall, fencing and landscaping, community beach, boats slips, re-alignment for the county road and pedestrian underpass. (AR 30, Findings of Fact Conclusions of Law and Decision dated the 19th day of August, 2005, Finding of Fact 37, pages 5 through 7; AR 33, Supplementary Staff Report by Deana Walter, pages 3 through 5; AR 137, Application Materials).

In May, June, September, November and December of 1993, the project was revised to include as of December 2, 1993, an eighty (80) unit townhouse development (including four (4) single family residential units on six (6) acres including sea wall, eighty-eight (88) slip marina, water front access, grocery/hardware store, re-alignment of the country road and pedestrian underpass). (AR 30, Findings of Fact Conclusions of Law and Decision dated the 19th day of August, 2005, Finding of Fact 37, pages 5 through 7; AR 33, Supplementary Staff Report by Deana Walter, pages 3 through 5; AR 137, Application Materials). There were additional revisions on March 14, 1994 and April 11, 1994. . (AR 30, Findings of Fact Conclusions of Law and Decision dated the 19th day of August, 2005, Findings of Fact 37 and 38, pages 5 through 9; AR 33, Supplementary Staff Report by Deana Walter, pages 3 through 5; AR 137, Application Materials). On April 27, 1994, as established by a date stamp on the documents, Chelan County and WICO signed and filed a mitigated determination of non significance (hereinafter "MDNS") and mitigation agreement for eighty (80) townhouse units, community beach facility and boat moorage on six (6) acres. (AR 30, Findings of Fact Conclusions of

Law and Decision dated the 19th day of August, 2005, Finding of Fact 37, pages 5 through 7; AR 33, Supplementary Staff Report by Deana Walter, pages 3 through 5; AR 137, Application Materials). On June 13, 1994, a revised application and site plan were submitted indicating that the conditional use permit was for an eighty (80) unit condominium on a ten (10) acre site. (AR 30, Findings of Fact Conclusions of Law and Decision dated the 19th day of August, 2005, Finding of Fact 37, pages 5 through 7; AR 33, Supplementary Staff Report by Deana Walter, pages 3 through 5; AR 137, Application Materials). Thereafter by revisions dated July 10, 1998 and August 14, 2003 the site size was increased to twenty point five (20.5) acre site. (AR 30, Findings of Fact Conclusions of Law and Decision dated the 19th day of August, 2005, Finding of Fact 37, pages 5 through 7; AR 33, Supplementary Staff Report by Deana Walter, pages 3 through 5; AR 137, Application Materials). Further revisions were done thereafter to increase the site size to twenty three (23) acres. (AR 30, Findings of Fact Conclusions of Law and Decision dated the 19th day of August, 2005, Finding of Fact 37, pages 5 through 7; AR 33, Supplementary Staff Report by Deana Walter, pages 3 through 5; AR 137,

Application Materials). The revisions to the applications at the time of the hearing before the Hearing Examiner in 2005, was for two single family residential water front units, seventy eight (78) townhouse/condominium units across the road and waterfront amenities. (AR 30, Findings of Fact Conclusions of Law and Decision dated the 19th day of August, 2005, Finding of Fact 37, pages 5 through 7; AR 33, Supplementary Staff Report by Deana Walter, pages 3 through 5; AR 137, Application Materials).

In 2005 the Hearing Examiner concluded that the application vested in April of 1994, Findings of Fact No. 9, 50 and 51. (Administrative Record document 30, Findings of Fact Conclusion of Law and Decision dated the 19th day of August, 2005, Finding of Fact #9 at page 2, Findings of Fact #38 at pages 7-9 and Findings of Fact # 50 and 51 at page 10). The MDNS and mitigation agreement date stamped April 27, 1994, was for the development on six (6) acres. Hearing Examiner Kottkamp reviewed the record and stated at Findings of Fact No. 50 and 51 as follows:

> 50. The original application was submitted in March 1989. The application was deemed complete for processing pursuant to the issuance of the MDNS and

Mitigation Agreement in April 1994, therefore vested as of this date. This approval is applicable to those application materials, and requested development amenities stipulated in the application materials on file as of April 1994.

51. The specific approval based upon the site plan and file f record in April 1994 (as time of SEPA MDNS & Mitigation Agreement). The application on file at the time of the issuance of the MDNS and Mitigation Agreement was dated January 28, 1992 and stipulated 50 condominium units, as did the updated SEPA checklists dated January 28, 1992 and May 11, 1993. Subsequent updates to the SEPA checklist, dated June 14, 1993, September 21, 1993, November 12, 1993, December 2, 1993, March 14, 1994 and April 1994, all stipulated 80 condominium units, as such, the application was processed and reviewed for 80 units from June 1993 forward. The application was updated by the applicant to reflect the accurate number of units on June 13, 1994, which relates back to the January 1992 submittal documents. Permitted components within this approval are identified on the updated/revised site plan of record date stamped June 15, 2005, and include:

80 unit condominium development (78 units west of road, 2 waterfront SFR units)
80 boat slip marina with boat pump out station
Bioengineered stream bank protection and enhancement
Community Pool
Residential parking & boat trailer storage for condominium residents.
Walkways/Paths for access between County road and marina
Stormwater retention ponds
Private access roads
Community sand lined drainfields
Water intake

Hearing Examiner Kottkamp found that the revisions including the revision dated June 13, 1994 related back to the January 1992 submittal documents and therefore was in place as an amendment for consideration at the April 1994 vesting date. Hearing Examiner Kottkamp concluded that April 27, 1994 MDNS and Mitigation Agreement could not have been entered into unless the application was complete, AR 30, Findings of Fact and Conclusions of Law dated the 19th day of August, 2005, Conclusions of Law #10 at page 15.

Each revision prior to April 1994 and subsequent to April 1994 resulted in Amended Mitigated Declaration of Non Significance and Mitigation Agreements being signed between the County and WICO (AR 30, Findings of Fact and Conclusions of Law and Decision dated the 19th day of August, 2005, Finding of Fact #38 at pages 7 through 9, Finding of Fact #50 and 51 at page 10; AR 33, Supplementary Staff Report pages 3 through and including 5, page 7, 8, Administrative Record document 131, Amended MDNS dated 7/13/05, Administrative Record document 135 Agreement between WICO and Chelan County dated February 3, 2005

and Administrative Record document 137, Application Materials). As of February 3, 1995 the MDNS and Mitigation Agreement signed by the County reflected revisions to a minimum of ten (10) acres all as previously disclosed by filed documents. In the trial court, Dorsey and Kelly argued that as of April 1994 the application did not comply with either the zoning or the comprehensive plan. Dorsey and Kelly's briefing specifically addressed the zoning challenge and in oral argument brought forth the argument that the project also did not comply with the Lower Lake Chelan Basin Comprehensive Plan, hereinafter referred to "LLCBCP". Oral argument indicated that even if the project complied with the zoning in effect in 1995, that the project did not comply with the LLCBCP that was adopted in 1990, and that the LLCBCP was controlling over the zoning code.

WICO argued in oral argument that the specific zoning took precedence over the implementation recommendation cited by Dorsey and Kelly from the LLCBCP. Dorsey and Kelly argued, without authority, that although that may be the general rule, that in the present case the LLCBCP controlled. WICO argued at the trial court that the various

amendments related back to the 1992 or 1994 applications thereby supporting the Hearing Examiner's finding that WICO's rights vested in April of 1994, or alternatively that there were other dates that WICO's rights vested that all preceded the revisions to the comprehensive plan and zoning code adopted by Chelan County on October 17, 2000.

In 1964 through October 17, 2000 and specifically as of April 1994 the property involved in the application was zoned GU General Use District. (Administrative Record 30, Findings of Fact Conclusions of Law and Decision dated August 19, 2005, Findings of Fact #52 and 53, Administrative Record document #33, Supplementary Staff Report). Effective the 14 day of August, 1990 Chelan County adopted the LLCBCP.

The subject property was rezoned and a new comprehensive plan enacted on October 17, 2000. (Administrative Record 30, Findings of Fact Conclusions of Law and Decision dated August 19, 2005, Findings of Fact #52 and 53, Administrative Record document #33, Supplementary Staff Report). The original Chelan County Comprehensive Plan designated the property as Rural (R) as of April 1994, and until October

17, 2000, when the property was re-designate pursuant to the new Chelan County Comprehensive Plan as Rural-Residential/Resource 10 (RR10) and rural waterfront (RW).

On the 19th day of August, 2005, Chelan County Hearing Examiner, Kottkamp rendered findings of fact, conclusions of law, and a decision approving WICO's project with conditions. (Administrative Record document 30, Findings of Fact Conclusions of Law and decision).

Dorsey and Kelly filed a petition for review of the Hearing Examiner's decision with the Chelan County Superior Court. (CP 1). The trial court conducted the oral argument on the 8th day of May, 2006 and signed and filed an Order Granting Petitioner's Land Use Petition on the 22nd day of June, 2006. (Clerks Papers #38).

C. ARGUMENT.

I. Appropriate Review Standards.

Dorsey and Kelly's petition was to be appropriately reviewed pursuant to RCW 36.70C.130 at the trial court level and is before the Court of Appeals under the same review standard.

RCW 36.70C.130 provides the review standards in relevant part as follows:

> (1) The superior court, acting without a jury, shall review the record and such supplemental evidence as is permitted under RCW 36.70C.120. The court may grant relief only if the party seeking relief has carried the burden of establishing that one of the standards set forth (a) through (f) of this subsection has been met. The standards are:
>
> (a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;
> (b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;
> (c) The land use decision is not support by evidence that is substantial when viewed in light of the whole record before the court;
> (d) The land use decision is clearly erroneous application of the law of the facts;
>
> * * * *

The standard for review in a "LUPA" appeal has been analyzed and set forth in The City of University Place v. McGuire, 44 Wn.2d 640, 30 P.3d 453 (2001) as follows:

> Review is governed by the Land Use Petition Act (LUPA), chapter 36.70C.120 RCW. To prevail University Place must establish either the Hearing Examiner made a mistake of law, that there was insufficient evidence to support the decision, or that the decision was clearly erroneous. [FN2] Errors of law are reviewed de novo. Girton v. City of Seattle, 97 Wn.App. 360, 363, 983 P.2d 1135 (1999), review denied, 140 Wn.2d 1007 (2000). Whether the Hearing Examiner correctly applied the diminishing asset doctrine to the 1.4 acres will be reviewed to determine if it was clearly erroneous. Schofield v. Spokane County, 96 Wn.App. 581, 586, 980 P.2d 277 (1999). The decision as a whole will be reviewed for substantial evidence supporting the Hearing Examiner's decision. Substantial evidence is "a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order." City of Redmond v. Cent. Puget South Growth Mgmt. Hearings Bd., 136 Wn.2d 38, 46, 959 P.2d 1091 (1998) (quoting Callecod v. Wash. State Patrol, 84 Wn.App. 663, 673, 929 P.2d 510.

144 Wn.2d 640, 647.

In determining whether there is substantial evidence supporting the Hearing Examiner's decision, the court should view the facts in a light most favorable to WICO, the party that prevailed before the Hearing Examiner. As noted in City of University Place v. McQuire, at 652 -653:

> Evidence will be viewed in the light most favorable to McGuire, as 'the party who prevailed in the highest forum that exercised fact-finding authority, a process that necessarily entails acceptance of the factfinder's views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences.' State ex. Rel. Lige & Wm. B. Dickson Co. v. County of Pierce, 65 Wn.App. 614, 618, 829 P.2d 217 (1992). Review is deferential. Schofield, 96 Wn.App. at 586.

The Washington Court of Appeals has further discussed the review standards in Schofield v. Spokane County, 96 Wn.App. 581, 980 P.2d 277 (1999) at pages 586 – 587 as follows:

> Issues raised under subsection (b) are questions of law, reviewed de novo. *City of Redmond v. Central Puget Sound Growth Management Hearings Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998). Regarding (c), substantial evidence is " 'a sufficient quantity of evidence to persuade a fair –minded person of the truth or correctness of the order.' " *Id.* (quoting Callecod v. Washington State Patrol, 84 Wn.App. 663, 673, 929 P.2d 510, review denied, 132 Wn.2d 1004 (1997)). The clearly erroneous test for (d) is whether the court is "left with the definite and firm conviction that a mistake has been committed." *Anderson v. Pierce County*, 86 Wn.App. 290, 302, 936 P.2d 432 (1997). Our review is deferential. We view the evidence and any reasonable inferences in the light most favorable to the party that prevailed in the highest forum exercising fact-finding authority. *Davidson v. Kitsap County*, 86 Wn.App. 673, 680, 937 P.2d 1309 (1997).

II. The General Use zoning ordinance was and is controlling over the LLCPCB and the trial court erred in finding and concluding otherwise. (Assignment of Error No. 2, 5, 7, 8, 14, 16, 17 and 18, and Issue No. 1).

Prior to October 17, 2000 and specifically in April 1994 and immediately thereafter the property contained within WICO's project was zoned General Use District pursuant to Chapter 11.36 of the Chelan County Code as adopted in 1964 and amended thereafter through August of 1979.

Chapter 11.36.010 provided:

> 11.36.010 Uses Permitted outright. In a GU district the following uses and their accessory uses are permitted outright:
>
> (1) Single family and duplex dwelling * * *

Chapter 11.36.030 stated as follows:

> 11.36.030 Lot Size. In general use (G-U) district, the lot size shall be as follows:
>
> (1) The minimum lot area shall be ten thousand square feet when served by an approved public or community water and sewer system.

> (2) In all other instances, lot size shall be in accord with Chelan-Douglas Health District requirements however in no case shall the lot size be less than ten thousand square feet * * *

Dorsey and Kelly argued at the Trial Court level and the Trial Judge agreed that the General Use District zoning was not in compliance with the LLCBCP, and therefore, even is WICO's project complied with the General Use District zoning, the project was incorrectly approved because the project failed to comply with the LLCBCP. WICO argued that the zoning ordinance controlled over the implementation recommendations of the LLCBCP.

The LLCBCP section sited by Dorsey and Kelly from the implementation recommendations of the LLCBCP at page 54 states:

> 5. Rezone lands in the rural area to allow residential development to occur at densities consistent with the comprehensive plan and the availability of supporting utilities, services, transportation systems and other infrastructure components. For lands along shorelines not in resource production densities should be commensurate with utility availability. A density of one unit per acre is appropriate for lands served by adequate and safe yeararound access, domestic water supply systems capable of providing minimum fire flows and where reasonable opportunities exist to create a buffer or separation to

> safeguard the integrity of adjacent land that are in resource production. For other lands a density of one unit per 5 acres is appropriate in recognition of the limitations posed by physical constrains and the lack of full range of utilities.

Dorsey and Kelly's argument and the Trial Court's findings and Conclusions that the LLCBCP was controlling over the specific zoning are directly contrary to the case law of the State of Washington. In Schofield v. Spokane County, 96 Wn.App. 581, 980 P.2d 277 (1999) at 587 the Court of Appeals correctly recited the law of the State of Washington as follows:

> A proposed land use decision must generally conform to a county's comprehensive plan. *Citizens for Mount Vernon*, 133 Wn.2d at 873. However, the provisions in the plan are to be used as a planning guide, not a land use decision - making tool. *Id.* In other words, strict adherence is not required. *Id.* The issue in *Citizens for Mount Vernon* was whether a provision in the comprehensive plan or a zoning ordinance controlled. The court concluded the zoning ordinance took precedence, holding "[i]f a comprehensive plan prohibits a particular use but the zoning code permits it, the use would be permitted. *Id.* At 874.

Furthermore, the specific zoning code was adopted in 1964 and amended through August 1979. The LLCBCP was adopted on August 14, 1990. Presumably, the legislative body adopting the LLCBCP, the Board

of the Chelan County Commissioner's, who had also adopted the General Use zoning district was aware of the existing zoning, and, had the legislative body intended to override or eliminate the existing zoning, action should have and would have been taken to do so. The logical assumption and the legal presumption is that the Chelan County Board of Commissioners did not intend to change or negate the existing zoning for the project area. Sim v. Parks and Recreation, 90 Wn.2d 378, 583 P.2d, 1193 (1978).

In Sim v. Parks and Recreation, *supra*, at page 382 the Washington State Supreme Court interpreted conflicting venue provisions contained in two statutes enacted by the Washington State Legislature. One statue was enacted in 1973 and the other statute was enacted in 1959. The Supreme Court stated:

> The provisions of this statute permitting venue outside of Thurston County were enacted by the 1973 amendments to RCW 4.92.010 (Laws of 1973, ch. 44 § 1, p. 107). RCW 34.04.070, the declaratory judgment statute, was enacted in 1959. We presume therefore the legislature was familiar with it when it enacted the 1973 amendments to RCW 4.92.010. *Leonard v. Bothell*, 87 Wn.2d 847, 557 P.2d 1306 (1976); *Thurston County v. Gorton*, 85 Wn.2d 133, 530 P.2d 309 (1975). The legislature did not amend or

> repeal RCW 34.040.070 when it passed the 1973 amendments. Thus it is reasonable to infer a legislative intent to continue in effect the exclusive venue provision of RCW 34.04.070.
>
> 90 Wn.2d 378, 380.

Similarly, the Chelan County Board of Commissioners was presumably aware of the specific provision of the general use zoning as adopted by the board of Chelan County Commissioners in 1964 and variously amended through August 1979, when the board adopted on August 14, 1990, the LLCBCP that contained only an implementation recommendation that conflicted with the general use zoning code.

Furthermore, the zoning code dealt specifically with zoning and the implementation recommendation did not. Therefore, the specific terms of the zoning code would control over the general terms of the LLCBCP, Sim v. Parks and Recreation, 90 Wn.2d 378, 583, P.2d 1193 (1978); Hama Hama Co. v. Shorelines Hearing Bd., 85 Wn.2d 441, 536 P.2d 157 (1975).

III. Correct density – the correct density for WICO's project is five thousand (5,000) sq. Ft. Per unit. (Assignment of Error No. 2, 5, 7, 8, 16, 17 and 18, and Issue No. 3)

Dorsey and Kelly incorrectly represented to the trial court and the trial court incorrectly found that pursuant to the general use zoning, the maximum density allowed is one unit per ten thousand (10,000) square feet, or four point three five (4.35) units per acre. As represented in WICO's Reply Brief at the trial court level, the correct density is one unit per five thousand (5,000) square feet, or eight point seven one (8.71) units per acre.

The property was zoned in a general use district pursuant to Chapter 11.36 of the Chelan County code as adopted in 1964 and amended thereafter through August of 1979.

Chapter 11.36.010 provided:

> 11.36.010 Uses Permitted outright. In a GU district the following uses and their accessory uses are permitted outright:
>
> (1) Single-family and duplex dwelling * * *

Chapter 11.36.030 states as follows:

> 11.36.030 Lot Size. In general use (G-U) district, the lot size shall be as follows:
>
> (1) The minimum lot area shall be ten thousand square feet when served by an approved public or community water and sewer system.
>
> (2) In all other instances, lot size shall be in accord with Chelan-Douglas Health District requirements however in no case shall the lot size be less than ten thousand square feet * * *

Therefore, duplexes as an outright permitted use, could be built on any lot with the minimum lot size being ten thousand (10,000) square feet per lot. The allowable density is five thousand (5,000) square feet per unit.

Respondents project complied with the density requirements at various times throughout the process, except for one brief time when due to an oversight or typographical error when the subdivision and condominium project were divided and additional acreage was not allotted to the condominium project.

The condominium project or as then known the townhouse project was listed as a fifty (50) unit townhouse cluster with other amenities discussed throughout the project located on six (6) acres on March 20th of

1991 and on May 11th of 1993. Six (6) acres was adequate to support the fifty (50) townhouses or condominiums at eight point seven one (8.71) units per acre as allowed by zoning. Thereafter due to development costs and increased requirements to meet the requests of the state and local agencies in the comment letters within the administrative record from the various responding state and county agencies as recapped in the Hearing Examiner's Findings of Fact numbers 28, through and including, 35 set forth in Chelan County Hearing Examiner's Findings of Fact, Conclusion and Decision, dated March 8, 2002. (Administrative Record document #136, Findings of Facts Conclusions of Law and Decision with exhibits dated March 8, 2002) WICO revised the project to eighty (80) townhouses and later condominiums. However, due to an oversight or typographical error the project remained at six (6) acres, until June 13, 1994, revised application and site plan.

The application materials Administrative Record document 137 establishes that as of June 13, 1994, the condominium project had been revised pursuant to a revised conditional use permit application received by the county on June 13, 1994, to eighty (80) units on a ten (10) acre site.

The Hearing Examiner found that the June 1994, revisions related back to the 1992 and were in effect as of the April 1994 vesting date. As discussed hereinabove, with permissible density at eight point seven one (8.71) units per acre, based on five thousand (5,000) square feet per unit, the project as of June 1994 was within compliance with the general use zoning classification. Thereafter, even though certain elements of the project were eliminated in an attempt to meet concerns of various agencies and other opponents, including Dorsey and Kelly, the acreage continued to increase, see the staff report (Administrative Record document #33, Supplementary Staff Report) as referenced in the Findings of the Hearing Examiner from November 21, 1994 at ten (10) acres, July 10, 1998 at twenty point five (20.5) acres, August 14, 2003 at twenty point five (20.5) acres and the Hearing Examiner's Findings number 8 indicating that the subject site was now a twenty three (23) acre portion of a one hundred (100) plus acre tract (Administrative Record document #30, Findings of Fact Conclusions of Law and Decision dated August 19, 2005). As noted in WICO's Reply Brief at the trial level, the density of the approved

project had been reduced to three point four (3.4) units per acre at the time of approval.

WICO's project was at the ten (10) acre level as of April, 1994, as revised in June 1994, ten percent (10%) lower then the maximum density. WICO's project is obviously extremely lower with the approved twenty three (23) acre site as approved by the Chelan County Hearing Examiner. The 23 acre parcel even meets Dorsey and Kelly's and the trial court's incorrect density standards.

IV. Vesting – the record contains substantial evidence to support the Hearing Examiner's findings and conclusion that WICO's project vested on April 27, 1994. (Assignment of Error No. 1, 4, 5, 6, 7, 8, 10, 11, 12, 14, 16, 17 and 18, and Issue No. 3).

Any applicant has the right to have the uses as disclosed in the applicant's application considered by the County or Local Government under the laws in existence at the time of the application, Noble Manor Co. v. Pierce County, 133 Wn2d 269, 943 P.2d 1378 (1977) at page 283-284. Hearing Examiner Kottkamp's Findings of Fact No. 50 and 51, found that all of the uses approved were disclosed as of April 1994 as updated by the June 13, 1994, revisions regarding additional acreage. In

fact, the approved project contained less then the original application documents that were of record as of April 1994, the January 28, 1992, application as updated by SEPA checklist dated January 28, 1992, May 11, 1993, June 14, 1993, September 21, 1993, November 12, 1993, December 2, 1993, March 14, 1994 and April 11, 1994 as well as the June 1994 revision which related back to the January 1992 submittal documents. The eighty (80) units being processed from June 1993 forward ultimately included seventy-eight (78) units west of the road and two (2) water front single family residential units. The approved plan did not contain the store or additional water front units originally within the 1992 plan.

Dorsey and Kelly argued at the trial court level that realignment of the County road and the pedestrian underpass had been eliminated, and apparently the trial court believed that. However, the review of the administrative record including Administrative Record document #129, Amended Mitigation Determination of Non Significance dated July 13, 2005, continued to include at paragraph 8, "Traffic", provisions for

realignment of the County road and construction of a pedestrian underpass. (Administrative Record document #129, at paragraph 8).

The vesting of rights depends only on a showing that the application is complete and complies with the zoning ordinances and applicable codes in force at the time of the application, Southwell v. Whiting Transpiration, 101 Wn.2d 193, 676 P.2d 477 (1984). Thus, as noted by Hearing Examiner Kottkamp, from June 1993 forward the eighty (80) unit condominium project was completely and accurately disclosed and the acreage necessary to comply with the zoning ordinances and applicable code was in place as of April 1994 as updated or revised by the June 13, 1994 submission indicating the site plan was ten (10) acres.

There is substantial evidence to support the Hearing Examiner's decision, and Dorsey and Kelly failed to satisfy the burden of proof and prove otherwise.

V. The record contains substantial evidence to provide an alternate vesting date that preceded the re-zone adopted in the October 17, 2000. (Assignment of Error No. 9. 16, 17 and 18, and Issue No. 4).

Hearing Examiner Kottkamp reasoned in Findings of Fact No. 50 and 51, AR document #30, at page 10, all as more particularly set forth in the statement of the case hereinabove, that the June 13, 1994 revised application and site plan had the correct number of units and related back to times prior to April 27, 1994, the date of vesting. The June 13, 1994, revisions also changed the acreage to ten (10) acres in compliance with the zoning and correct density. Hearing Examiner Kottkamp concluded that the June 13, 1994 submission related back and therefore as of April 27, 1994, the application was in compliance with the zoning code.

Even if the Court of Appeals is somehow convinced by Dorsey and Kelly that WICO's project did not vest as of April 27, 1994, because the June 13, 1994, revisions containing the correct acreage do not relate back, the record contains substantial evidence that would support an alternate

vesting date of June 13, 1994, when the application was revised to submit the correct acreage that had inadvertently been over looked and not updated to ten (10) acres prior to that date or alternatively, February 3, 1995, when the Amended MDNS and SEPA Mitigation agreement were signed by Chelan County and WICO. Both of these documents were substantially the same as the project approved with the correct acreage. Each date provides an alternative basis to uphold the Hearing Examiner's decision of approval of WICO's project.

Vesting is actually a constitutional right, and WICO should not lose that constitutional right when WICO's application clearly vested before the change of the ordinances even though the engineer and the Hearing Examiner picked a particular date that had a technical difficulty if the June 13, 1994, revision does not relate back, i.e., the prior application contains six (6) acres and the June 13, 1994 revisions changed the application to ten (10) acres, see Erickson & Associates, Inc. v. McLerran, 123 Wn.264, 870 (1994), that states in relevant part:

> Erickson correctly asserts our vesting doctrine is rooted in constitutional principles of fundamental fairness. The doctrine reflects a recognition that development rights

> represent a valuable and protectable property right (citation omitted). By promoting a date certain a vesting point, our doctrine ensures "that new land-use ordinances do not unduly oppress development rights, thereby denying a property owner's right to due process under the law" (citation omitted). Our vested rights cases thus establish the constitutional minimum: a "date certain" standard that satisfies due process requirements.

Obviously the Hearing Examiner noted that the June 13, 1994, revision related back, and therefore, even if the court is not convinced that the June 13, 1994, revision did relate back, the Hearing Examiner has suggested a legitimate alternate vesting date of June 13, 1994 by the reasoning process utilized by the Hearing Examiner.

VI. WICO's project vested prior to October 17, 2000, and should be considered under the zoning code and comprehensive plan in effect prior to that date and specifically in effect in April of 1994. (Assignment of Error No. 3, 4, 6, 10, 11, 12, 14, 15, 16, 17 and 18, and Issue No. 5).

As discussed hereinabove in section IV, once the project vested, i.e. was substantially complete and disclosed the uses ultimately approved, WICO was entitled to have its application processed according to the zoning ordinance in effect as of April 1994, see Noble Manor Co. v Pierce County, 133 Wn.2d 269, 943 P.2d 1378 (1977).

Therefore, the pending zone change and ultimate zone change that occurred October 17, 2000, after the submission of WICO's application and revisions thereto but prior to the final hearing regarding the application is not effective or applicable to WICO's application, see also Southwell v. Whiting Transpiration, 101 Wn.2d 193, at 200, 676 P.2d 477 (1984).

VII. Dorsey and Kelly did not meet their burden of proof to establish that the Hearing Examiner's decision was either clearly erroneous or was not supported by substantial evidence. (Assignment of Error No. 13, 16, 17 and 18, and Issue No. 6).

There is substantial evidence in the administrative record to support each and every finding of fact of Hearing Examiner Kottkamp and there are adequate findings of fact and legal authority to support each conclusion of law entered by Hearing Examiner Kottkamp. Therefore, Dorsey and Kelly failed to meet their burden of proof and failed to establish pursuant to RCW 36.70C.030 subsection (b) that the Hearing Examiner made an erroneous interpretation of the law, or subsection (c) that the land use decision was not supported by evidence that is substantial or under subsection (d) that the land use decision was clearly erroneous.

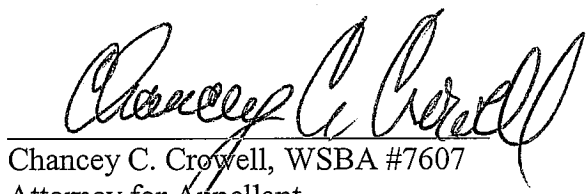
The Trial Court's findings and conclusions supporting Dorsey and Kelly's position were clearly erroneous and should be reversed.

D. CONCLUSION

The trial court erred in entering Finding of Fact No. 4 through and including 6, 9 through and including 17, and Conclusions of Law No. 1 through and including 5, and the Order including paragraphs 1 through 3.

The Trial Court's Order should be reversed and the cause should be remanded with directions to the trial court to dismiss Dorsey and Kelly's Petition and grant an order upholding Hearing Examiner Kottkamp's decision.

Respectfully submitted,



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